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No. 89-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEIRDRE V. BATCH,

Petitioner,

v.

TOWN OF CHAPEL HILL, NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the North Carolina Supreme Court

MOTION OF THE NATIONAL ASSOCIATION OF HOME BUILDERS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF IN SUPPORT OF THE PETITION

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May 18, 1990

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MOTION OF THE NATIONAL ASSOCIATION OF HOME BUILDERS FOR LEAVE TO FILE THE ATTACHED BRIEF *AMICUS CURIAE*

The National Association of Home Builders (NAHB) respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of Petitioner.

The NAHB has received the petitioner's written consent to file this brief as *amicus curiae* in support of petitioner and has filed the letter of consent with the Clerk of this Court. The respondent town has declined our request for consent to file a brief in support of the petition.

The NAHB represents 157,000 builder and associate members organized into approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The Just Compensation Clause and its implementation as a shield against oppressive governmental land use regulation is of paramount importance to the NAHB. The actual availability of compensation for the occasional ordinance that results in a taking is critical to the livelihood of private landowners who either 1) have lost all reasonable economic use of their property solely in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with governmental requirements that fail to substantially advance legitimate governmental interests. The latter type of governmental requirement is presented in this case by the town's defacto conversion of private property into a public highway right-of-way.

The NAHB has been before this Court as an *amicus curiae* or as of counsel on behalf of the property owner in prior "takings" cases involving governments' land use decisions. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *San Diego Gas & Electric*

Co. v. City of San Diego, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). We submit the attached brief to the Court to resolve the question of whether a government that exacts a defacto right-of-way from an individual for the public must pay just compensation to the property owner when the property owner neither contributes to the public's need for the right-of-way nor will benefit from the right-of-way.

This *amicus* sincerely believes that the accompanying brief will greatly assist the Court because our concerns are much broader than those of petitioners. Our members are faced with countless regulatory decisions on a daily basis across the nation that affect the use of privately held land and the ability to provide society with necessary and affordable shelter. The vast majority of these decisions come from local governments and, as pointed out in the accompanying brief, some of these decisions do not respect the constitutionally protected property rights of individuals. While petitioner focuses her arguments on the harm the town of Chapel Hill inflicts on her, our brief addresses the broader mandates of takings law that should be applied against those government decisions that abuse private rights and cites authorities different from those in petitioner's brief.

The government here claims that what it required of the property owner was a lesser interest than that required by the government in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (involving issuance of a permit to build a house conditioned on the grant of an easement to the public to walk across the private property), and, therefore, there is no constitutional transgression. However, the court below

does not even allow a property owner to ask the constitutional question. This type of creative thinking and pleading on the part of a local government and the failure of the judiciary to supervise such actions interferes with the constitutional right of all property owners to use their land subject only to reasonable regulation.

The Town of Chapel Hill does not stand alone in this regard and it is in the interests of our members, who are severely constrained by such governmental creativity, to support a constitutional philosophy that forces government decision makers to respect individual rights.

For the above reasons, this Motion should be granted.

Respectfully submitted,

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May 18, 1990

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth in the preceding motion for leave to file this brief.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

This petition is the property owner's last resort to receive just compensation from the defendant town, required by the United States Constitution when property is taken for a public use.[1] If she fails before

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[1] U.S. Const. amend. V, as incorporated by the U.S. Const. amend. XIV. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 307 (1987); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980); *see Chicago, B. & Q. R.Co. v. Chicago*, 166 U.S. 226, 239 (1897).

this Court, she loses for good because the North Carolina Supreme Court ordered the trial court to enter summary judgment for the government.

This case is not about whether the government has the authority to do what it did here. Rather, the constitutional consequence to the government of properly exercising its authority is what is before the Court. This case is about the level of protection afforded by the federal Constitution's Just Compensation clause to an individual, Dr. Deirdre Batch, who has been aggrieved by a town government. Yet the court below ended the discussion after holding that the town had authority to require the owner of land not to build on a substantial portion of it because the town may use it in the future as a highway. The court expressly refused to answer the landowner's question of whether if so authorized the prohibition nonetheless amounts to a taking under the federal Constitution. The egregious failure of a lower court to make the critical distinction between authority questions and constitutional questions requires repair by this Court.

The North Carolina Supreme Court, *Batch v. Town of Chapel Hill*, 387 S.E.2d 655, 663 (N.C. 1990), ruled that the town of Chapel Hill should have been granted summary judgment because of the town council's finding that "Dr. Batch's subdivision application failed to take into account present and future road plans as set forth in the town's Thoroughfare Plan." *Id.* at 662. Whatever distinction respondent and the court below attempt to draw with respect to a formal dedication of a right-of-way, this case deals with a town that exacted from a property owner a defacto highway easement without paying for what the property

owner has lost. And, "[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." *United States v. Causby*, 328 U.S. 256, 261 (1946). The town's proposed highway will provide no access to Dr. Batch's land, it damages the scenic and residential character of her property, and it is a highway the need for which is not created by her proposed residential use. The prohibition of a use of land to effectuate a legitimate public purpose when the proposed land use has no "essential nexus" to that public purpose should be redressed by the Constitution when the prohibition is not accompanied by recompense for the individual's loss. *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987).

Planning for and acquiring the necessary land and capital to build adequate infrastructure to support our cities and towns is an important goal in maintaining society's quality of life. But propositions that further those ends must respect the property rights and other liberties of individuals. Anything short of that proper respect, as occurred here, is repugnant to the higher considerations expressed in the Constitution. Dr. Batch's Constitutional rights must be confirmed and this *amicus* respectfully requests the Court to grant certiorari in order to send anew the message to all governments that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

REASONS FOR GRANTING THE WRIT

I. THE NORTH CAROLINA SUPREME COURT FAILED TO DISTINGUISH BETWEEN THE WHOLLY SEPARATE QUESTIONS OF THE AUTHORITY OF A GOVERNMENT TO REGULATE AND THE CONSTITUTIONALITY OF OTHERWISE VALID REGULATION

The plaintiff's challenge here is not a threat to comprehensive planning nor is it an attack on the government's willingness and desire to provide for the health, safety and welfare of its citizens. The government is free to plan for future infrastructure and provide for the public good. The Just Compensation Clause "is designed 'not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.' " *Preseault v. Interstate Commerce Commission*, ___U.S. ___, 110 S. Ct. 914, 921 (1990)(citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987)); *Accord Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979)("[T]here is no question but that Congress could assure the public a free right of access . . . if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question."); *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 900 (Fed. Cir. 1986)("the question has got to be faced whether the impact of the regulation here involved was sufficiently severe under the facts, as undisputed or as found, [to effect a taking] and the unchallengeable legality in this proceeding of the regulatory act here involved, does not answer the question or even lead towards an answer.").

The North Carolina Supreme Court specifically condones the town's practice of prohibiting development

based on the property owner's failure "to take into account present and future road plans as set forth in the town's Thoroughfare Plan." *Batch v. Town of Chapel Hill*, 387 S.E.2d 655, 662 (N.C. 1990). The court below then dismissed the property owner's takings challenge and denies the existence of the court of appeals' takings analysis by saying only that the property owner was rightfully prohibited from exercising her right to build on her property. Since the town has the authority to regulate in such a manner, according to the court below, Dr. Batch can not receive any payment for the right-of-way for the highway that the town plans to place through her property. *See Id.* at 663-664. That analysis misses the point. The town may prohibit construction activity so as to preserve the land in a way that does not interfere with its planned highway. But then the next question is whether that prohibition of use amounts to a taking, as was asked and answered in the affirmative by the trier of fact and the state court of appeals. The state Supreme Court does not allow the property owner to even ask the constitutional question.[2]

In support of its conclusion that it need not address the property owner's constitutional claim because of its conclusion that the town had authority to do what

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[2] Whether the state trial court should have found that the town's actions in denying the plat amounted to a taking on a summary judgment motion is yet another wholly separate question. If a ruling on summary judgment was improper, then the property owner should be allowed to offer proof of her constitutional claim (preferably with more takings guidance from this Court) at trial, which the state Supreme Court precludes the owner from doing.

it did to Deirdre Batch, the North Carolina Supreme Court stated that its "decision is based solely on adequate and independent state grounds," *Batch*, 387 S.E.2d at 664. This places the new federalism on its head. Under state constitutional provisions, the state courts are free to provide more protection to individuals than that guaranteed by the United States Constitution. *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676-677 (1923); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). But the guarantees of the federal Constitution are the required minimum that all governments must afford to individuals. *Mills v. Rogers*, 457 U.S. 291, 300 (1982). This case concerns the extent to which the Just Compensation Clause of the 5th Amendment to the United States Constitution allows the government to interfere with individual property rights. At minimum, the state courts must give effect to the words and spirit of our federal Constitution and this Court's takings jurisprudence.

II. THE TOWN OF CHAPEL HILL SHOULD NOT BE ALLOWED TO DEPRESS THE VALUE OF DEIRDRE BATCH'S LAND TO REDUCE THE EXPENSE OF THE TOWN'S FUTURE CONDEMNATION AND ITS ACTIONS VIOLATE THIS COURT'S PRINCIPLE THAT THERE MUST BE AN "ESSENTIAL NEXUS" BETWEEN THE GOVERNMENT'S REQUIREMENT AND THE GOVERNMENT'S INTERESTS

Fairness and justice dictate that the public should pay the cost of infrastructure and the land upon which it is placed rather than forcing some people alone to bear those public burdens. *See Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This is especially so in those situations where, as here, "there is heightened risk that

the purpose [of the government's requirement] is avoidance of the compensation requirement, rather than the stated police power objective." *Nollan*, 483 U.S. at 841. "[T]he question at bottom is upon whom the loss . . . should fall." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

In the future when the town gets ready to build the highway, if the town plans on offering some compensation to the then existing property owners, its actions now are still unconstitutional because government's land use decisions should not be used to depress the value of land to reduce the expense of condemnation. *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993 (1st Cir. 1983); *United States v. Certain Lands In Truro*, 476 F. Supp. 1031, 1035-36 (D. Mass. 1979); *Hermanson v. Board of County Commissioners*, 595 P.2d 694 (Colo. Ct. App. 1979); *Department of Public Works And Buildings v. Exchange National Bank*, 334 N.E.2d 810 (Ill. App. 1975); 1 Anderson, *American Law of Zoning*, 774-75, §7.31 (1986 and 1989 Supp.); 9 A.L.R. 3d 304, §5(b) (1986 and 1988 Supp.) and cases cited therein; Petition for Certiorari at pgs. 16-17.

This case is very much like the *Nollan* case where Justice Scalia admonished the government in its attempt to compel a property owner to contribute to the realization of an easement, even where the government "may well be right that [the easement] is a good idea." The Court stated in *Nollan* that if the government "wants an easement across the Nollans' property, it must pay for it." *Nollan*, 483 U.S. at 842.

This Court has reiterated that a regulatory taking occurs if *either* the regulation or government action

denies a property owner all or substantially all economically viable use of the property *or* the regulation or government act does not substantially advance a legitimate government interest. *Nollan*, 483 U.S. at 834; *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The importance of maintaining the distinction between these two takings tests should be self-evident. There are occasions where a government's actions substantially advance legitimate government interests but nonetheless deny a particular landowner all economically viable use of the property.[3] Likewise, there are situations, such as in this case, where a government's actions do not deny a landowner all economically viable use of the property but nonetheless do not substantially advance a legitimate government interest. *Nollan*, 483 U.S. 825. In either situation, an analysis of both tests may be necessary to protect individuals against those situations where it would be unfair to impose costs on an individual that properly belong with the public. Of course, in some cases the regulation will fail on both counts. *Seawall Associates v. City of New York*, 542

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[3] *See, e.g., 1902 Atlantic Limited v. Hudson*, 574 F. Supp. 1381, 1404-05 (E.D. Va. 1983); *Florida Rock Industries, Inc. v. United States*, 22 Env't Rep. Cas. (BNA) 1943 (Cl. Ct. 1985), *aff'd in part, vacated in part and remanded*, 791 F.2d 893 (Fed. Cir. 1986); *Cf. United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985)(While ruling on the Clean Water Act's jurisdiction to regulate certain wetlands, the Court noted that a property owner can bring a takings claim in U.S. Claims Court if a dredge or fill permit is applied for and denied and the "effect of the denial is to prevent 'economically viable' use of the land in question").

N.E.2d 1059, 1065-66, 544 N.Y.S.2d 542, 548-49, *cert. denied*, ___ U.S. ___, 110 S. Ct. 500 (1989).

The petitioner here does not allege that the town's actions denied her all economically viable use of her property, but did assert from the beginning that the town's actions violated the second takings test. *See Batch v. Town of Chapel Hill*, 376 S.E.2d 22, 29 (1989), *rev'd*, 387 S.E.2d 655 (1990). Therefore, the Court need only look at whether the town's requirement that she not develop a significant portion of her property substantially advances, in the Constitutional sense, the town's legitimate interest in planning for a highway.

To avoid the payment of just compensation, this *amicus* believes this Court's opinions stating that a government's actions must "substantially advance a legitimate government interest" mandates, in the takings context, a direct connection (the Court's "essential nexus") between the government action and both the burden the individual places on the community (in this case, by her proposed land use) and the benefits the individual will receive from the government action (in this case, the benefit, if any, she will receive from the highway). *See Nollan*, 483 U.S. at 837. This direct connection requirement can be characterized as a balancing test, but the Court has stated that it requires more than the standards applied in due process or equal protection cases. *Nollan*, 483 U.S. at 834 n.3. The traditional due process standard that says "the State 'could rationally have decided' the measure adopted might achieve the State's objective" is not sufficient when analyzing government actions under the Just Compensation clause. *Id.*

The burden on the public produced by an individual and the benefit a governmental requirement extends to the individual must be part of the equation when evaluating the takings implications of a governmental act. It makes no sense to look at whether a particular requirement substantially advances a legitimate government interest without considering the relationships of the requirement and the government interest to the individual. Without the specific individual and the property interests he or she holds in the takings formula, the purpose of the Just Compensation Clause is destroyed.

While this *amicus* and many others hope for more takings guidance from this Court, it is not necessary in order to decide this case that the Court determine precisely how far beyond traditional due process standards the Just Compensation clause takes a court's review of governmental actions. For here, there is no direct, indirect or any other connection between the government action and either the burden the individual places on the community or the benefits received by the individual. Simply put, where the government requires a property owner to effectively grant a highway right-of-way that has *no* connection to the relevant burdens imposed on the community by the proposed land use or will not benefit the proposed land use, the government may preserve such private property only by the constitutional way of paying for the required land.

The property owner asserts that a dedication of land, a formal process under state laws to transfer private property to the government, was required by the town. We agree with petitioner and believe a dedication was required by Chapel Hill here. But even

if a formal dedication was not imposed on Dr. Batch as the North Carolina Supreme Court argues, *Batch v. Town of Chapel Hill*, 387 S.E.2d at 660-61, contrary to the North Carolina Supreme Court's opinion, *Id.* at 663, a requirement, proper as it is, that a property owner "take future as well as present road development into account when designing a subdivision" is just as damaging to the property owner's interests as a requirement to formally dedicate the land or grant an easement to the government for the future road. In order to "take into account" future road development the property owner must forego building on the property where the road will be placed. Regardless of what Chapel Hill or the court below call it, their definitions are distinctions without a difference. Dr. Batch, in effect, must grant to the public "a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, 483 U.S. at 832. Moreover, citing to *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979), Justice O'Connor has said " '[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation.' The Government's appropriation of other, lesser servitudes may also impose a burden requiring payment of just compensation. See *United States v. Causby*, 328 U.S. 256 (1946); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922)." *Preseault v. Interstate Commerce Commission*, ___ U.S. ___, 110 S. Ct. 914, 928 (1990)(J. O'Connor concurring).

III. THIS CASE IS AN EXAMPLE OF THE CONDITION OF LOCAL LAND USE PRACTICE THAT REQUIRES THIS COURT TO REITERATE THE ADMONITION THAT WITHIN THE SCHEME OF REGULATING PRIVATE ACTIONS PURSUANT TO POLICE POWERS THE GOVERNMENT MUST RESPECT THE CONSTITUTIONAL RIGHTS OF INDIVIDUAL CITIZENS

Few developers and builders litigate when municipal governments unfairly and unconstitutionally exact fees and property that have little relation to the services or benefits provided to a proposed project or the burdens placed on the community by the project. These entities, unlike Mr. and Mrs. Nollan, First English Evangelical Lutheran Church, and Dr. Deirdre Batch in this case, are entrepreneurs and businesses that simply find it not practical in almost all cases to challenge unconstitutional government requirements. In a national symposium on development exactions, Professor Babcock cited examples of abusive exactions and followed with this discussion:

> In each of these cases one can imagine the initial reaction of the "extractee" - outrage. In each case he surely went to his attorney and asked two questions: (1) How long will it take to get a final answer in court if we challenge this condition?; and (2) How much will it cost?
>
> The answers probably were: (1) It will take three to four years, with the possibility of defeat; and (2) It will cost tens if not hundreds of thousands of dollars.
>
> By the time the developer approaches his attorney, he has invested a large sum of front-end money and has a great deal of in-

> terest in obtaining a permit. Moreover, he wants the permit immediately. He takes out his pencil, does some calculating, and decides to pay up. This example is a classic illustration of what I call "municipal leverage."

Babcock, *Foreword to Exactions: A Controversial New Source For Municipal Funds*, 50 Law & Contemp. Problems 1, 2 (1987).

Also, most individual property owners can not afford to hire attorneys and pursue land use litigation and, therefore, like developers and builders, find it impractical to challenge a government action that inversely condemns their property without compensation.

Local governments are often well aware of the amount of time, money and other resources a builder of a large development or of a single house has invested in a project before the first plat application is submitted. Local governments are usually free to exercise their municipal leverage to extract all types of property interests and money from project applicants. Occasionally, courts will scrutinize the exercise of municipal leverage in ringing terms:

> While in general subdivision regulations are a valid exercise of the police power, made necessary by the problems subdivisions create - i.e., greater needs for municipal services and facilities -, the possibility of arbitrariness and unfairness in their application is nonetheless substantial: A municipality could use dedication regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order

> to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become grand theft.

Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976);

> We have no doubt the municipality was conscious of the illegality of what it did and for that reason refrained from adopting an ordinance, seeking instead to achieve its ends through the guise of "voluntary" contributions with spurious "agreements" to make them stick.
>
> Defendants argue that even if the payments were illegally extorted, as we think they were, nonetheless plaintiff ought not recover . . . .
>
> . . . .
>
> Defendants' position boils down to the proposition that one who buys with notice of municipal lawlessness thereby becomes bound by it. Thus understood, defendants' position is frivolous.

West Park Ave., Inc. v. Township of Ocean, 224 A.2d 1, 4-5 (N.J. 1966);

> Regulation H requires the dedication of seven-and-one-half per cent of the total land comprising the subdivision without any consideration of the town's need for the land. Moreover, there is evidence, that was improperly excluded, which indicates that some

> developers would be permitted to pay the town the value of the land in lieu of its dedication. This appears to us to be an out-and-out plan of extortion. . . .

J.E.D. Associates, Inc. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981).

The Just Compensation clause is one of the few constraints on the public's use of its regulatory powers over the use of an individual's land. Its full application is needed by property owners of all types to provide some balance to weigh against a municipality's leverage.

As difficult as a takings challenge is for the property owner, the Just Compensation clause should remain a fundamental crutch to support the property owner in fighting the heavy-handed leverage brought to the table by the municipality. The North Carolina Supreme Court's opinion below further deteriorates this constitutional crutch and, by creative drafting, does so without ever citing to this Court's long line of takings cases or even noting the North Carolina Court of Appeals' interpretation of this Court's *Nollan* decision, *Batch v. Town of Chapel Hill*, 376 S.E.2d 22, 34 (N.C. Ct. App. 1989), *rev'd*, 387 S.E.2d 655 (N.C. 1990).

This *amicus* does not mean to suggest that all local governments - counties, cities and towns - are ruthless and unreasonable in conducting the affairs of their daily land use decision making processes. Many, if not most, are reasonable and sincere in their efforts to promote the public's health, safety and welfare. But while too many communities disrespect Constitutional considerations for the sake of political or fi-

nancial expediency, even if only one community forsakes one of its citizen's rights, the Constitutional damage is done and we are all worse off because of it. It is exactly in those situations that Constitutional doctrine must be developed to protect individual rights, including property rights. The courts must step in to correct such damage and restore fairness and justice.

This Court has eloquently stated that the legislature is the domain for identifying the public's interest in legislation.

> An attempt to define [the police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts. . . . Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . .

Berman v. Parker, 348 U.S. 26, 32 (1954). With equal if not greater force, however, the judiciary must be the guardian of individual and property rights. The legislature defines the scope of the public's interest but when individual and property rights are destroyed in the process, the courts should step in and define when such destruction goes too far and insure that adequate remedies exist to redress such loss. The North Carolina Supreme Court has failed to exercise its power of supervision over the conflict between the public's interest and Dr. Batch's property rights as protected by the United States Constitution.

The Court has noted that

> many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 416.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321- 22 (1987).

The Court has produced a long line of takings cases, culminating in its 1987 trilogy of decisions that changed several rules of the land use game, yet left many questions still undecided. *See, First Church*, 482 U.S. 304; *Nollan*, 483 U.S. 825; and *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987). However, a recent article by two of this country's foremost land use law scholars and practitioners provides a forceful indictment of the practice of leaving the development of takings jurisprudence to state courts when it properly belongs within federal court purview. The two authors admittedly have widely varying opinions about many substantive aspects of takings law, citing to their published views on the issue. Professor Daniel R. Mandelker is a self-described "police power hawk," and Michael M. Berger is a land use litigator who generally represents

property owners. And while they disagree on many substantive "takings" issues, they jointly state that

> those substantive differences have not prevented agreement on a fundamental, overriding, procedural issue: Who should be involved in developing the substantive legal precepts for regulatory takings?
>
> The thesis is simple: If, as seems inescapable from the Supreme Court's recent takings decisions, federal constitutional law will control the outcome of these issues [citing to *First Church*, 482 U.S. 304], then the rational conclusion is that the federal courts should take a lead role in formulating the controlling Fifth Amendment jurisprudence. The alternative of leaving the exposition of federal constitutional law to the vagaries of 50 state courts - each attempting to interpret unclear pronouncements from the Supreme Court . . . - can yield only chaos. Even if the Fifth Amendment's protection is eventually to be left to the state courts to implement, it ought to await further development of substantive federal constitutional guidelines by the federal courts. To date, the Supreme Court's decisions have been far too Delphic to provide a solid ground on which the state courts could be expected to act with any consistency.

Mandelker & Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 Land Use Law & Zoning Digest 3 (January 1990). The context of the present case is a perfect vehicle

within which to elaborate on and reaffirm Just Compensation Clause principles.[4]

Local government and state court decisions, such as those below, that vitiate federal Constitutional guarantees must be reversed. Property owners, like Deirdre Batch and the tens of thousands of property owners represented by this *amicus*, have nowhere else to turn, and both the regulators and the regulated await with hope for more United States Supreme Court guidance on this critical issue within the law of the use of privately held American land.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, this Court is urged to issue a writ of

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[4] There is no ripeness question in this case since the town will not allow development under any conceivable set of circumstances on that portion of the private land the town wants for its highway and, therefore, the final, definitive position of the town with respect to this issue has been offered the property owner. *See MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351, *reh'g denied*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-194 (1985). Even if the town could conceive of some use of the property consistent with its desire to preserve a corridor of land for its future highway, the allowed use is irrelevant since the property owner alleges that the requirement to preserve the highway corridor, irrespective of whatever use is allowed, does not substantially advance a legitimate government interest.

As for other ripeness issues, the lower court decision is final because there is no remaining litigation. *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 632-633 (1981). Also, the property owner followed the state's inverse condemnation procedures for seeking just compensation in the state courts. *See Hamilton Bank*, 473 U.S. at 194-197.

certiorari to review the judgment and opinion of the North Carolina Supreme Court.

Respectfully Submitted,

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